Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1842

D. J. McDUFFIE, INC., ET AL.

Petitioners

VERSUS

OLD RELIABLE FIRE INSURANCE COMPANY, ET AL.

Respondents

PETITION OF D. J. McDUFFIE, INC. AND WARD DRILLING CO., INC. FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NO.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

D. J. McDuffie, Inc. and Ward Drilling Co., Inc., plaintiffs in the captioned cause, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 10, 1979 (original decision) and on February 29, 1980 per curiam denial of rehearing and amendment to original opinion).

CITATIONS TO OPINIONS BELOW

The opinion of the District Court was entered on August 5, 1977, and has not been reported. Copy of the opinion is found in the appendix to this petition for writs. The original opinion of the District Court appears at 608 F.2d 145 and is reproduced in the appendix to this petition for writs. The opinion the Fifth Circuit Court of Appeals in denying the petition for rehearing en banc appears at F.2d and is reproduced in the appendix to this petition for writs.

JURISDICTION

The per curiam opinion of the United States Court of Appeals for the Fifth Circuit denying rehearing in this cause was entered on February 20, 1980. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction for this petition is invoked under 28 U.S.C § 1254 (1), 62 Stat. 928. Petitioners here, plaintiffs below, contest the diversity jurisdiction of the Court based on missing and defective allegations in defendants' removal petition. This jurisdictional question is one of the questions presented in this petition.

JUDGMENTS BELOW

The judgment of the District Court was entered on August 5, 1977, at 3:30 P.M. Copy of the judgment of the District Court is reproduced in the appendix to this petition for writs. The judgment of the Court of Appeals for the Fifth Circuit was entered on December 10, 1979. Copy of the judgment of the Court of Appeals for the Fifth Circuit is reproduced in the appendix to this petition for writs.

STATUTES INVOLVED

UNITED STATES CODE
28 U.S.C. §1254

Courts of Appeals; certiorari; appeal; certified questions.

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods.

(1) By writ of Certiorari granted upon the petition of any party to any Civil or Criminal case, before or after rendition of judgment or decree:

28 U.S.C. §1332

§1332. **Diversity of citizenship; anount in controversy; costs**

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State

by which it has been incorporated and of the State where it has its principal place of business: *Provided further*, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "State", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1446

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, petition for removal may be filed within thirty days after

receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

28 U.S.C. §1653

§ 1653. Amendment of pleadings to show jurisdiction

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Rule 15.

AMENDED AND SUPPLEMENTAL PLEADINGS

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may

grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

REVISED STATUTES

L.S.A. - R.S. 22: 2

§ 2. Insurance regulated in the public interest

A. Insurance is a business affected with the public interest and it is the purpose of this Code to regulate that business in all its phases.

L.S.A. - R.S. 22: 6

Kinds of insurance .

Insurance shall be classified and defined as follows:

(13) Marine and transportation (inland marine).

(a) Insurance against loss or damage to vessels, craft, aircraft, vehicles of every kind, (excluding vehicles operating under their own power or while in storage not incidental to transportation) as well as all goods, freights, cargoes, merchandise, effects, disbursements, profits, moneys, bullion, precious stones, securities, choses in action, evidence of debt, valuable papers, bottomry and respondentia interests and all other kinds of property and interests therein, in respect to, appertaining to or in connection with any or all risks or perils of navigation, transit or transportation, including war risks, on or under any seas or other waters, on land or in the air, or while being assembled, packed, crated, baled, compressed or similarly prepared for shipment or while awaiting the same or during any delays, storage, trans-shipment or reshipment incident thereto, including marine builder's risks and all personal property floater risks;

(b) Insurance against loss or damage to persons or property in connection with or appertaining to marine, inland marine,

transit or transportation insurance, including liability for loss of or damage to either arising out of or in connection with the construction, repair, operation, maintenance, or use of the subject matter of such insurance, (but not including life insurance or surety bonds nor insurance against loss by reason of bodily injury to the person arising out of the ownership, maintenance or use of automobiles);

(e) "Marine protection and indemnity insurance," meaning insurance against, or against legal liability of the insured for, loss, damage, or expense incident to ownership, operation, chartering, maintenance, use, repair or construction of any vessel, craft or instrumentality in use in ocean or inland waterways, including liability of the insured for personal injury, illness or death or for loss of or damage to the property of another person.

L.S.A. - R.S. 22: 619

§ 619. Warranties and misrepresentations in negotiation; application

A. Except as provided in Sub-section B of this Section and R.S. 22:692, no oral or written misrepresentation or warranty made in the negotiation of an insurance contract, by the insured or in his behalf, shall be deemed material or defeat or avoid the contract or prevent it attaching, unless the misrepresentation or warranty is made with the intent to deceive.

B. In any application for life or health and accident insurance made in writing by the insured, all statements therein made by the insured shall, in the absence of fraud, be deemed representations and not warranties. The falsity of any such statement shall not bar the right to recovery under the contract unless such false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer.

L.S.A. - R.S. 22: 692

§ 692. Breach of warranties and conditions of fire policies and applications therefor

No policy of fire insurance issued by any insurer on property in this state shall hereafter be declared void by the insurer for the breach of any representation, warranty or condition contained in the said policy or in the application therefor. Such breach shall not avail the insurer to avoid liability unless such breach (1) shall exist at the time of the loss, and be either such a breach as would increase either the moral or physical hazard under the policy, or (2) shall be such a breach as would be a violation of a warranty or condition requiring the insurer to take and keep inventories and books showing a record of his business. Notwithstanding the above provisions of this Section, such a breach shall not afford a defense to a suit on the policy if the fact or facts constituting such a breach existing at the time of the issuance of the policy and were, at such time, known to the insurer or to any of his or its officers or agents, or if the fact or facts constituting such a breach exited at the time of the loss and were, at such time, known to the insurer or to any of his or its officers or agents, except in case of fraud on the part of such officer or agent or the insured, or collusion between such officer or agent and the insured.

L.S.A. - R.S. 22:1403

§ 1403. Scope of rate regulation

A. This Part applies to fire, marine and transportation (inland marine), title insurance and casualty insurance risks or operations in this state.

B. For the purpose of this Part, fire insurance includes insurance coverage as defined in paragraphs (10), (11b), and (12) of

R.S. 22:6, and such other coverages as are usually written by fire insurers other than motor vehicle insurance; marine and transportation (inland marine) insurance includes personal floater insurance and the kinds of insurance defined in paragraph (13) of R.S. 22:6 and such other inland marine coverages as may be so established by interpretation, by ruling of the commission, or by general customs of the business; title insurance includes the kind of insurance coverage as defined in paragraph (9) of R.S. 22:6, and casualty insurance includes the kinds of casualty insurance defined in paragraphs (3), (4), (5), (6), except personal property floater, (7), (8), (11a) of R.S. 22:6, and such other coverages as are usually written by casualty insurers.

C. This Part shall not apply:

1. To reinsurance, other than joint reinsurance to the extent stated in R.S. 22:1414.

2. To insurance of vessels or craft, their cargoes, marine builders' risks, marine protection and indemnity; or other risks commonly insured under marine, as distinguished from inland marine, insurance policies.

3. To insurance against loss or damage to aircraft or against liability, other than workmen's compensation and employers' liability arising out of the ownership, maintenance or use of aircraft, nor to insurance of hulls of aircraft, including their accessories and equipment.

4. To health and accident insurance.

D. If any kind of insurance, subdivision of combination thereof or type of coverage is subject to regulation under Sections of this Part, the provisions of which conflict, an insurer to which such conflicting provisions are otherwise applicable shall file with the commission a designation as to which of said sections shall be applicable to it with respect

to such kind of insurance, subdivision or combination thereof or type of coverage.

QUESTIONS PRESENTED

I.

Whether the rule of the Fifth Circuit, which is contrary to the rulings of district courts of several other circuits, is correct in holding that a removal petition may be amended, after the expiration of the time to file a removal petition, to correct deficient allegations and to furnish missing allegations necessary to show diversity jurisdiction.

II.

Whether the District Court and Court of Appeals ignored the clear holding of the United States Supreme Court in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, when those courts held that United States general admiralty law applied to avoid a marine hull insurance policy for breach of an implied warranty when an applicable, valid Louisiana statute provides that no breach of warranty may void the policy unless made with the intent to deceive.

STATEMENT OF THE CASE

This case was originally commenced in the Tweny-Fourth Judicial District Court for the Parish of Jefferson in the State of Louisiana, when D. J. McDuffie, Inc., former owner of the inland barge drilling rig known as the RIG NO. 15, formerly the DELSEY D, commenced this suit for $275,000.00, and certain additional amounts, against defendant underwriters, Old Reliable Fire Insurance Company, Yosemite Insurance Company and Reserve Insurance Company on a policy of marine hull insurance insuring the vessel. McDuffie's interest

in the vessel and in the policy arose from its position as owner of the vessel, which was, however, subject to a lease with option to purchase in favor of Ward Drilling Co., Inc. Subsequently, the vessel, where it then lay mostly submerged and upside down in the deep water ship channel connecting New Orleans with the Gulf of Mexico, was transferred by McDuffie to Ward Drilling, together with all claims pursuant to the insurance policy which forms the subject of this suit, McDuffie, however, retaining an interest in the recovery under the policy.

Defendant insurance companies timely filed a removal petition.

Subsequently, a motion to remand was filed on the grounds that the removal petition failed to allege diversity of citizenship between the plaintiffs and defednats as of the time of the filing of the original suit and as of the time of the filing of the removal petition, and failed to allege the location of the principal offices of defendant insurance corporations.

Subsequent to the thirty (30) day period permitted by 28 U.S.C. §1446 for filing removal petitions, defendants submitted an amended removal petition furnishing the missing allegations. The District Court permitted the filing of this amended petition and then held that the amended petition cured the missing removal allegations.

Petitioners sought, and were denied, the right to certify this question to the Court of Appeals for review at that time.

Subsequently, Ward Drilling Co., Inc. intervened in the suit and defendants answered denying liability for various reasons, including an alleged breach of the warranty of seaworthiness.

Following an extensive trial on the merits, the District Court held that the RIG NO. 15 was unseaworthy as of the time of the inception of the policy, and applied United States general maritime law, to the exclusion of Louisiana state law, to hold

that this served to acoid the policy for breach of an implied warranty of seaworthiness at the inception of the policy.

Louisiana Revised Statutes, Title 22, Section 619 provides in part as follows:

> "Warranties and misrepresentations in negotiation; applications
>
> A. Except as provided in Sub-section B of this Section and R.S. 22:692, no oral or written misrepresentation or warranty made in the negotiation of an insurance contract, by the insured or in his behalf, shall be deemed material or defeat or avoid the contract or prevent it attaching, unless the misrepresentation or warranty is made with the intent to deceive." 1/

On appeal to the United States Court of Appeals for the Fifth Circuit, that court affirmed holding:

1. The faulty allegations of citizenship could be amended by an amended removal petition filed after the 30 day period provided in 28 U.S.C. §1446(a); and

2. That general maritime law applied to the exclusion of Louisiana law to hold that a breach of warranty at the inception of a policy avoided the policy.

Petitioners' petition for rehearing and for rehearing en banc directed to the Fifth Circuit was denied, the Fifth Circuit, however, amending its original opinion to insert a footnote distinguishing *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*,

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1/ Sub-section B is not applicable because it refers to life or health and accident policies, and R.S. 22:692 refers to fire policies.

348 U.S. 310, on the grounds that several Fifth Circuit opinions announced subsequently to this Court's opinion in the *Wilburn Boat* case in 1955 sufficed to establish a federal rule of general maritime law concerning implied warranties of seaworthiness sufficient to vitiate the ruling of this Court in *Wilburn Boat*.

After the appeal was lodged in the Fifth Circuit, Reserve Insurance Company was put into liquidation. The Fifth Circuit denied a motion to stay this case pending determination of the liquidation proceedings.

JURISDICTION OF THE COURT BELOW

As set forth above, this case was removed by defendants from the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana, to the United States District Court for the Eastern District of Louisiana based on a defective removal petition, which was amended after the expiration of the 30 day period provided by 28 U.S.C. §1446. Petitioners contest this jurisdiction and this jurisdiction is one of the issues contained in this petition for certiorari.

REASONS FOR GRANTING WRITS

I.

THE RULE OF THE FIFTH CIRCUIT PERMITTING AMENDMENTS TO REMOVAL PETITIONS AFTER THE EXPIRATION OF THE TIME TO FILE A REMOVAL PETITION TO CORRECT DEFICIENT ALLEGATIONS AND TO ADD MISSING ALLEGATIONS IS CONTRARY TO THE RULINGS OF THE DISTRICT COURTS IN OTHER CIRCUITS, VIOLATES THE INTENTION OF THE APPLICABLE STATUTES AND SHOULD BE REVERSED.

The United States Court of Appeals for the Fifth Circuit affirmed the District Court in permitting an amendment to the allegations of a removal petition to correct missing allegations with respect to diversity after the 30 day period for removal granted by 28 U.S.C. §1446 had expired and after a motion to remand had been filed and brought on for hearing.

Petitioners, plaintiffs below, contend that the rule of the Fifth Circuit permitting amendments of removal petitions to correct defective and missing allegations of citizenship with respect to diversity jurisdiction is incorrect and suggest that this Court should grant writs to review this rule and to clear up a conflict in decisions between the Fifth Circuit and the District Courts of other districts.

The original removal petition failed to allege that diversity of citizenship pursuant to 28 U.S.C. §1332 existed both as of the time of the filing of the original complaint and as of the time of the filing of the removal petition. [2/] Further the petitions failed to allege the principal place of business of the defendant corporations, which is likewise an improper allegation.

It is beyond dispute that without the amendment, the lack of these allegations was fatal to the diversity jurisdiction of the District Court. ***Jackson v. Allen, West & Bush, Brown Brothers & Co., et l,*** 132 U.S.27, 10 S.Ct. 9, 33 L.Ed. 249 (1889); ***Stevens v. Nichols,*** 130 U.S. 230, 9 S.Ct. 518, 32 L.Ed. 914 (1889); ***Rodriguez v. Continental Oil Company, et al,*** 334 F.Supp. 656 (S.D. Texas, 1971); ***Bell v. Whittenton,*** 250 F.Supp. 550 (W.D. Missouri, 1966); ***Smith v. Fisher Pierce Company,*** 248 F.Supp. 815 (E.D. Tenn. 1965); ***Bradford v. Mitchell Brothers Truck Lines,*** 217 F.Supp. 525 (N.D. Calif.

[2/] **Copies of the original petition and of the removal petition are reprinted in their entirety in the appendix.**

(N.D. Calif. 1963); *Garza v. Midland National Insurance Company*, 256 F.Supp. 12 (S.D. Fla. 1966); *Guerrino v. Ohio Casualty Insurance Company*, 423 F.2d 419 (3rd Cir. 1970); *Chapman v. Ozark Forest Products, Inc.*, 246 F.Supp. 816 (W.D. Mo. 1965); *Teeter v. Iowa-Illinois Gas & Electric Company*, 237 F.Supp. 961 (N.D. Iowa, 1964); *Franks v. City of Okemah, Oklahoma*, 175 F.Supp. 193 (E.D. Okla., 1959); and *Browne v. Hartford Fire Insurance Company*, 168 F.Supp. 796 (N.D. Ill. 1959).

When the motion to remand was filed in the District Court, well after the 30 day period for removal had expired, defendants moved to amend their petition to provide the missing allegations with respect to the principal place of business and to amend the defective allegations. The District Court permitted this amendment and denied the motion to remand.

The Fifth Circuit has consistently held that amendments should be freely permitted in order to permit the correction of defective allegations with respect to diversity of citizenship or to permit the addition of missing allegations which could have been made but were not made at the time of the filing of the removal petition. The Fifth Circuit relies on Rule 15(a) of the Federal Rules of Civil Procedure and on 28 U.S.C. §1653. See also *American Motorist Insurance Co. v. American Employers Insurance Company*, 608 F.2d 624 (1979), where the Fifth Circuit, on its own motion, remanded a case for amendment of the defective removal petition.

District courts in other districts have held to the contrary that amendment is not permitted after the time for removal has passed. *Roseberry v. Fredell*, 174 F.Supp. 937 (D.C. Ky. 1959); *Carlton Properties, Inc. v. Crescent City Leasing Corp.*, 212 F.Supp. 370 (D.C. Pa. 1962); *Van Horn v. Western Elec. Co.*, 424 F.Supp. 920 (E.D. Mich. 1977); *William Kalivas Constr. Co. v. Vent Kontrol of Kansas City, Inc.*, 325 F.Supp. 1008 (W.D. Mo. 1970); *Brown v. Hartford Fire Ins. Co.*, 168

F.Supp. 796 (D.C. Ill. 1959); *Walsh v. American Airlines, Inc.*, 264 F.Supp. 514 (E.D. Ky. 1967).

Still other district courts have held that amendments should be permitted to correct defective allegations but not to supply missing allegations. *Evans-Hailey Company v. Crane Company*, 207 F.2d 193 (D.C. Tenn. 1962). This would seem to be in accord with the early cases from this Court. *Kenney v. Columbia Savings & Loan Assn.*, 191 U.S. 78, 48 L.Ed. 103 (1903).

The removal statute should be strictly construed and removal petitions should be granted only where the dictates of Congress have been strictly complied with. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 85 L.Ed 1214 (1941).

It is submitted that the policy of the Fifth Circuit freely permitting amendments of removal petitions both to permit the correction of defective allegations and to permit the supplying of missing allegations necessary for removal of cases pursuant to diversity jurisdiction as set forth in 28 U.S.C. §1332 runs contrary to the intent of Congress, permits overcrowding of the courts, and is contrary of the decisions of the district courts in many other circuits. Accordingly, it is submitted that writs to be granted to review this rule of the Fifth Circuit and to remove the conflict between the circuits.

II.

THE FIFTH CIRCUIT AND THE DISTRICT COURT RULED CONTRARY TO THE RULING OF THIS COURT IN *WILBURN BOAT CO. V. FIREMAN'S FUND INS. CO.*, 348 U.S. 310, IN HOLDING THAT GENERAL MARITIME LAW APPLIED TO REQUIRE THE AVOIDANCE OF A MARINE HULL INSURANCE POLICY FOR BREACH OF AN IMPLIED WARRANTY WHEN AN APPLICABLE, VALID LOUISIANA STATUTE PROVIDES TO THE CONTRARY.

The District Court held that a breach of an implied warranty of seaworthiness at the inception of an insurance policy served to avoid the policy and defeat plaintiffs' claims pursuant thereto. 3/This finding by the District Court was on the basis that the general maritime law of marine insurance applied and a holding that there was an implied warranty of seaworthiness imposed on all policies. In doing so, the court refused to apply Louisiana law, and, in particular, La. R.S. 22:619, which provides in part:

> "Warranties and misrepresentations in negotiation; applications
>
> A. Except as provided in Sub-section B of this Section and R.S. 22:692, no oral or written misrepresentation or warranty made in the negotiation of an insurance contract, by the insured or in his behalf, shall be deemed material or defeat or avoid the contract or prevent it attaching, unless the misrepresentation or warranty is made with the intent to deceive." 4/

3/The face amount of the policy was $275,000, and plaintiffs claim a further amount of $68,750, being 25% of the face amount as sue and labor and salvage expenses, together with attorneys' fees, penalties and interest for failure to pay. It was not contested in the District Court that the face amount of the policy and the sue and labor expenses at least would be due but for the court's holding that the policy was avoided by the breach of warranty and the court's further finding that the casualty resulted at least in part from the condition of the vessel. The Fifth Circuit did not consider the causation problems but relied entirely on the avoidance of the policy as a result of breach of warranty.

4/ Sub-section B and R.S. 22:692 do not apply. Sub-section A is made applicable to marine hull insurance by the Louisiana Insurance Code R.S. 22:2 and R.S. 22:6.

There was no evidence that any breach of warranty was made with any intent to deceive. It is clear that if this Louisiana statute were found to apply, the policy would not be found to be void.

The Fifth Circuit affirmed stating that this court's decision in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 319, 75 S.Ct. 368, 99 L.Ed. 337 (1955), does not apply because since the pronouncement of *Wilburn Boat* by this court several intervening Fifth Circuit cases had established a general maritime rule to the effect that a breach of warranty of seaworthiness at the inception of the policy serves to avoid the policy. *Gulfstream Cargo Ltd. v. Reliance Ins. Co.*, 409 F.2d 974, 981 ns. 19, 20 (5th Cir. 1969); *Fireman's Fund Ins. Co. v. Wilburn Boat Co.*, 300 F.2d 631, 647 n. 12 (5th Cir. 1962); and *Sadkatchewan Government Ins. Office v. Spot Park*, 242 F.2d 385 (5th Cir. 1957).

It is submitted that this decision by the Fifth Circuit, and the similar decision by the District Court, is directly contrary to the rule pronounced by this Court in *Wilburn Boat*, and that writs should be granted and this opinion and judgment reversed.

No explanation by this counsel is needed to explain the decision by this Court in *Wilburn Boat*. This Court, at 99 L.Ed. 337, at 346, stated:

> "Under our present system of diverse state regulations, which is as old as the Union, the insurance business has become one of the great enterprises of the Nation. Congress has been exceedingly cautious about disturbing this system even as to marine insurance where Congressional power is undoubted. We, like Congress, leave the regulation of marine insurance where it has been - with the State." (footnotes omitted) 99 L.Ed. 337, at 346

Earlier in that decision, this Court, in the opinion by Justice Black, considered the undoubted power of the federal courts to fashion an admiralty rule, considered the possible alternatives, and clearly rejected them. Justice Black's language was as follows:

> In this very case, should we attempt to fashion an admiralty rule governing policy provisions, we
> *[320]
> would at *once be faced with the difficulty of determining what should be the consequences of breaches. We could adopt the old common-law doctrine of forfeiting all right of recovery in the absence of strict and literal performance of warranties, but that is a harsh rule. Most States, deeming the old rule a breeder of wrong and injustice, have abandoned it in whole or in part. But that has left open the question of what kind of new rule could be substituted that would be fair both to insurance companies and policyholders. Out of their abundant broad experience in regulating the insurance business, some state legislatures have adopted one kind of new rule and some another. Some States for example have denied companies the right to forfeit policies in the absence of an insured's bad faith or fraud. Other States have thought this kind of rule inadequate to stamp out forfeiture practices deemed evil. The result, as this Court has pointed out, has been state statutes like that of Texas which "go to the root of the evil" and forbid forfeiture for an insured's breach of policy terms unless the breach actually contributes to bring about the loss insured against. Northwestern Nat. L. Ins. Co. v. Riggs, 203 US 243, 253, 254, 51 L ed 168, 172, 173, 27 S Ct 126, 7 Ann Cas 1104. Thus there are a number of other possible rules from which this Court could fashion one for admiralty. But such a choice involves varied policy

considerations and is obviously one which Congress is peculiarly suited to make. And we decline to undertake the task.

It is readily apparent that the Fifth Circuit chose to ignore this decision of this Court and went ahead, nevertheless, to fashion its own rules concerning an implied warranty of seaworthiness with respect to marine insurance policies. It should be noted that all of the cases cited by the Fifth Circuit in support of its rule, *Gulfstream Cargo Ltd. v. Reliance Ins. Co.*, 409 F.2d 974 (5th Cir. 1969); *Tropical Marine Products v. Birmingham Fire Ins. Co. of Pa.*, 247 F.2d 116 (5th Cir. 1957); and *Sadkatchewan Government Ins. Office v. Spot Park*, 242 F.2d 385 (5th Cir. 1957), arose after this Court's decision in *Wilburn Boat*, and were directly contrary to the instructions given therein.

It should further be noted that even the concurring opinion by Justice Frankfurter, which would have preferred to restrict the ruling in *Wilburn Boat* to strictly inland water policies is not adverse to petitioners here. The evidence presented below clearly indicated that the RIG NO. 15 had been wholly within the inland waters of the State of Louisiana for the entire period for which the policy was in effect.[5/]

5/ **Plaintiffs further submitted to both the District Court and the Fifth Circuit authorities to show that even the alleged general maritime law implied warranty of seaworthiness at the inception of the policy did not apply because the drilling rig was, in fact, on a voyage at the time the policy attached. See *New York & R.P.S.S. Co. v. Aetna Ins. Co.*, 204 Fed. 225 (2nd Cir. 1913); Healy, 41 Tul. L. Rev. p. 235. Neither the District Court nor the Fifth Circuit confronted this argument.**

For the foregoing reasons, it is submitted that this petition for writ of certiorari should be granted and that after due proceedings had, this matter should be remanded to the District Court, with instructions this matter be reconsidered in light of the Louisiana statute which holds that a breach of warranty shall not void the policy unless there be a showing of an intent to deceive.

CONCLUSION

Wherefore, it is submitted that writs should be granted, and that after due proceedings had, this matter should be remanded to the District Court, with instructions that this matter be remanded to the state court for further proceedings.

Alternatively, it is submitted that in the event that diversity jurisdiction is found to exist, this matter should then be remanded to the District Court, with instructions that further proceedings be had pursuant to Louisiana law in accordance with the rule established in ***Wilburn Boat Co. v. Fireman's Fund Ins. Co.***, 348 U.S. 310, and in accordance with the law of Louisiana with respect to the effect of an alleged breach of warranty in a marine insurance policy.

Respectfully submitted,

Neal D. Hobson per m.a.s.
Neal D. Hobson

Joseph W. Looney per m.a.s.
Joseph W. Looney

Michael E. Wanek per m.a.s.
Michael E. Wanek

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that copy of the above and foregoing was mailed, postage prepaid, to counsel for respondents, Mr. Benjamin W. Yancey, International Trade Mart, New Orleans, Louisiana 70130, this 20th day of May, 1980.

Neal Hebert per m.a.s.

APPENDIX

D. J. McDUFFIE, INC. v. OLD REL. FIRE INS.

D. J. McDUFFIE, INC., et al.,
Plaintiffs-Appellants,

v.

OLD RELIABLE FIRE INSURANCE CO. et al.,
Defendants-Appellees.

No. 77-2968.

United States Court of Appeals,
Fifth Circuit.

Feb. 20, 1980.

Action on marine hull policy was dismissed by the United States District Court for the Eastern District of Louisiana, Edward J. Boyle, Sr., J., and insureds appealed. The Court of Appeals affirmed, 608 F.2d 145. Thereafter, the Court of Appeals denied rehearing but amended opinion by including footnote holding that it was not required that federal court's decision on policy coverage be governed by appropriate state law, in light of existence of a federal maritime rule extending an implied warranty of seaworthiness to a maritime hull policy.

Rehearing denied.

Admiralty Key 1.20(2)

Where there existed a federal maritime rule extending an implied warranty of seaworthiness to a maritime hull insurance policy, federal court, in suit on such a policy was not prevented from deciding case with reference to established federal maritime rules and was not required to govern its decision on policy

coverage by appropriate state law.

Appeal from the United States District Court for the Eastern District of Louisiana.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(5 Cir. 1979, 608 F.2d 145)

Before THORNBERRY, GEE and HATCHETT, Circuit Judges.

PER CURIAM:

On consideration of the Petition for Rehearing and Petition for Rehearing En Banc, the panel has determined that it would be helpful to include a discussion of *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955). Accordingly, the opinion is amended by including a footnote following the citation to *Gulfstream Cargo, Ltd. v. Reliance Insurance Co.*, on page 147, last paragraph, left column, twenty lines from the bottom of the page. The footnote shall read as follows:

> *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955), does not require our decision on policy coverage be governed by appropriate Louisiana law. As noted by Justice Harlan in *Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed.2d 56 (1961), and as this court recognized in *Gulfstream* and in the final *Wilburn* case, the Supreme Court premised its application of state law in *Wilburn* on the lack of a federal maritime rule governing the matter there presented. See, *Gulfstream Cargo Ltd. v. Reliance*

Ins. Co., 409 F.2d 974, 981 ns.19, 20 (5th Cir. 1969); *Fireman's Fund Ins. Co. v. Wilburn Boat Co.*, 300 F.2d 631, 647 n.12 (5th Cir. 1962). Our circuit acknowledges the existence of a federal maritime rule extending an implied warranty of seaworthiness to a maritime hull insurance policy. *Gulfstream; Tropical Marine Products v. Birmingham Fire Ins. Co. of Pa.*, 247 F.2d 116 (5th Cir. 1957); *Saskatchewan Government Ins. Office v. Spot Park*, 242 F.2d 385 (5th Cir. 1957). In light of this rule, we are not prevented by the *Wilburn* holding from deciding the case with reference to established federal maritime rules governing the warranty involved.

The Petition for Rehearing on behalf of McDuffie and Ward Drilling Co. is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the Petition for Rehearing En Banc is DENIED.

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St. Paul, Minn.

D. J. McDUFFIE v. OLD RELIABLE FIRE INS.

D. J. McDUFFIE, INC., et al.,
Plaintiffs-Appellants,

v.

OLD RELIABLE FIRE INSURANCE CO., et al.,
Defendants-Appellees.

No. 77-2968.

United States Court of Appeals,
Fifth Circuit.

Dec. 10, 1979.

In action removed from state court, the United States District Court for the Eastern District of Louisiana, Edward J. Boyle, Sr., J., dismissed action by insureds against insurers seeking to recover proceeds of marine hull policy, and insureds appealed. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) faulty allegations of diversity jurisdiction in original removal petition were properly cured in amended petition; and (2) evidence was sufficient to support finding that insureds breached their implied warranty of seaworthiness at outset of policy period, thereby voiding policy.

Affirmed.

1. Removal of Cases Key 94

Failure to specifically allege in original petition for removal citizenship of parties at time suit was brought and at time petition was filed was not fatal omission which could not be cured by amendment; such faulty allegations were proximately

cured in amended petition for removal. 28 U.S.C.A. §§ 1441 (a) 1653; Fed.Rules Civ.Proc. rule 15(a), 28 U.S.C.A.

2. Removal of Cases Key 94

Amendment of petition for removal to cure defective allegation of diversity jurisdiction is authorized by terms of statute providing that defective allegation of jurisdiction may be amended, upon terms, in trial of appellate courts. 28 U.S.C.A. §§ 1441(a), 1653.

3. Insurance Key 336.6

In action by insureds against insurers seeking to recover under marine hull policy, evidence was sufficient to support finding that insureds breached their implied warranty of seaworthiness at outset of policy period, thereby voiding policy.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before THORNBERRY, GEE and HATCHETT, Circuit Judges.

HATCHETT, Circuit Judge:

D. J. McDuffie, Inc. (McDuffie) and Ward Drilling Company, Inc. (Ward) appeal an order of the district court dismissing their action for proceeds of an insurance policy underwritten by the appellees. We affirm.

This action stems from the capsize of a submersible drilling barge (Rig No. 15) owned by McDuffie and operated by Ward.

At the time of the capsize, Rig No. 15 was insured by a marine hull policy in the amount of $275,000, which covered loss due to "Perils . . . of the Seas" and "all other like Perils." The policy also extended coverage for damage "directly caused" by:

> (j) Bursting of boilers, or any latent defect in the machinery or Hull . .
>
> . . . . . .
>
> (n) Negligence of the masters, mariners, charterers, engineers, pilots, and other members of the drilling crew; provided such loss or damage has not resulted from want of due diligence by the owners of the vessel . . ..

When appellees refused to provide coverage, McDuffie brought suit in state court. On petition of the insurers, the case was removed to the federal district court by way of original diversity jurisdiction under 28 U.S.C. § 1441(a). Citing evidence demonstrating the extensively deteriorated condition of the vessel, the district court found that the appellants had breached their implied warranty of seaworthiness attaching at the outset of the policy period. Breach of the implied warranty rendered the policy ineffective and made unnecessary a determination of actual causation. Nevertheless, the judge went on to conclude that in any event the loss did not result from any of the insurable causes.

The appellants argue that: (1) the case was improperly removed to federal court; (2) the district court erred in declaring the policy void for breach of implied warranty; and (3) the loss of the rig was caused at least in part by one or more insured perils.

[1] In their original petition for removal the insurers failed to specifically allege the citizenship of the parties at the time the suit was brought and at the time the removal petition was filed. Appellants moved to remand the cause to state court,

citing the failure to specifically allege citizenship. The district court allowed the insurers to amend their removal petition to cure the omission, and denied the motion to remand. The appellants argue that the missing allegation is a fatal omission which cannot be cured by amendment. We disagree.

[2] In *Firemen's Insurance Company of Newark, N.J. v. Robbins Coal Company, Inc.*, 288 F.2d 349 (5th Cir. 1961), where a movant had failed to allege corporate citizenship in a petition for removal, we held that, "a defective allegation of diversity jurisdiction in a suit originally filed in a federal district court can be amended in the Court of Appeals." *Id.*, at 350. As we pointed out in *Firemen's Insurance*, the amendment is authorized by the term of 28 U.S.C. § 1653. That section provides that, "[d]efective allegations of jursidiction may be amended, upon terms, in the trial of appellate courts."

In light of our decision in *Firemen's Insurance*, we hold that the faulty allegations were properly cured in the amended petition for removal filed in the federal district court. See, *American Motorists Insurance Co. v. American Employers' Insurance Co.*, 600 F.2d 15 (5th Cir. 1979); RUle 15(a), Fed.R. Civ.P.

[3] We also hold that the record supports the district court's finding that the appellants breached their implied warranty of seaworthiness at the outset of the policy period. *Gulfstream Cargo, Ltd. v. Reliance Insurance Co.*, 409 F.2d 974 (5th Cir. 1969). Rig No. 15 had not been dry-docked and its hull had not been inspected during a six-year period preceding the capsize. During that time, it was in regular use and exposed to the normal abuse attendant upon an inland barge's operation. The appellant's expert witness testified that one month before the policy was to take effect, he had recommended that Rig No. 15 be dry-docked for critical repairs. The trial court found that the vessel lacked necessary deck plating, manhole systems,

compartmental separations, and bottom plating. Each of these rig fixtures must be functioning properly to give the vessel the watertight integrity it requires. Facts also demonstrated that recurrent listing to port or starboard and constant pumping of water became standard operating procedures. On the basis of these facts, the district court concluded "that Rig No. 15 was not reasonably well-suited for its intended use as an inland drilling barge as of August 15, 1974." See, *Gulfstream Cargo, Ltd. v. Reliance Insurance Co.* After reviewing the record, we cannot say that the challenged finding was clearly erroneous or without evidentiary support. Accordingly, we sustain the finding. Rule 52(a), Fed.R.Civ.P.: *Baggett v. Richardson*, 473 F.2d 863 (5th Cir. 1973).

Because breach of the implied warranty of seaworthiness voids the insurance contract, we do not reach the appellants' contention that the capsize resulted from a peril insured against in the policy.

The judgment is AFFIRMED.

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Saint Paul, Minn.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-2968

D. J. McDUFFIE, INC., ET AL.,
Plaintiffs-Appellants,

versus

OLD RELIABLE FIRE INSURANCE CO., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana
Before THORNBERRY, GEE and HATCHETT,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that the plaintiffs-appellants pay to the defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

December 10, 1979

ISSUED AS MANDATE: February 28, 1980

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

D. J. McDUFFIE, INC., ET AL

VERSUS

OLD RELIABLE FIRE INSURANCE CO., ET AL

Filed: 1977

MEMORANDUM OPINION AND ORDER

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Attorneys for Defendants

BOYLE, District Judge:

This litigation stems from the capsize on September 27, 1974 of a submersible drilling barge while it was under tow on the Mississippi River Gulf outlet and *en route* from the area of Eloi Bay to the Harvey Canal. The vessel at the time was owned by the plaintiff corporation D. J. McDuffie, Inc. [McDuffie], but had been leased to, and was being operated by, the plaintiff corporation Ward Drilling Company, Inc. [Ward]. Called the "Delsey D" by McDuffie, the barge was re-designated by Ward - and will be referred to hereafter - as "Rig No. 15."

Ward is the named insured and McDuffie "an additional insured" in a marine hull policy (CU 10151), insuring Rig No. 15 in the amount of $275,000 for the one-year period commencing on August 15, 1974. *See* Exh. P-1. The policy was issued through Continental Underwriters of the South, Inc., and it apportioned participation among the defendants Old Reliable Fire Insurance Co. (57%), Yosemite Insurance Co. (25%) and Reserve Insurance Co. (18%). *See id.* It generally covered loss due to "Perils . . . of the Seas . . . and . . . all other like Perils. . . ." causing damage to the vessel. By a specially endorsed Inchmaree Clause, coverage also was extended to damage "directly caused" by, *inter alia:*

> (j) Bursting of boilers, or any latent defect in the machinery or Hull . . .
>
> [and] (n) Negligence of the masters, mariners, charterers, engineers, pilots, and other members of the drilling crew provided such loss has not resulted from want of due diligence by the owners of the vessel or any of them. . . .

See id.

Upon the refusal of the defendants to accept tender of the vessel following its capsize and to acknowledge coverage for the damage incurred, McDuffie brought suit against the underwriters in state court. *See D. J. McDuffie, Inc. v. Old Reliable Fire Ins. Co., et al.*, No. 170049, Docket 5, 24th Judicial District Court for Parish of Jefferson. The defendants petitioned for removal to this court on the ground of our original diversity jurisdiction, pursuant to 28 U.S.C. § 1441(a), and we denied McDuffie's motion to remand. *See* Record Doc. No. 8. The complaint then was amended to add Ward as a party plaintiff, that company, subsequent to the casualty, having acquired the barge as well as an assignment of McDuffie's rights under the hull policy subject to the payment to McDuffie

of a fixed portion of whatever insurance proceeds might be recovered. *See* Exh. P-6. McDuffie and Ward now jointly seek judgment in the face amount of the policy ($275,000), plus $68,750 for "sue and labor" expenses allegedly owed under the policy, a 12% penalty and attorney's fee said to be owed by the defendants under state law (LSA-R.S. 22:658) because of their arbitrary refusal to provide coverage and pre-judgment interest from the date of said refusal.

Rig No. 15 was built in 1942 and acquired by McDuffie in 1957. It was an unpowered, all-welded steel barge measuring 196' x 34' x 11', with a key-way slot at one end and a total of ten compartments below. 1/ When purchased in 1957, the vessel was dry-docked and the necessary rig equipment installed to convert it into a drilling barge. Several years thereafter, in 1961, the rig again was dry-docked, this time for repairs by the American Marine Corporation in New Orleans. The latter's invoices reflect that McDuffie delivered the barge in "critical sinking condition," and that the work, performed between December of 1961 and mid-February of 1962, included hull repair and the installation of some new plating. *See* Exh. P-26. The final dry-docking of the rig before its capsize took place in 1968. An invoice dated August 31 of that year from Hunt Tool Company of Houston, Texas, indicates that there was a dry-docking for "inspection and repairs," and that the work included replacing part of the barge's keel-cooler system, replacing a section of deck plate and removing, as well as "blanking off," certain pipe inside the hull. *See* Exh. P-31. 2/

1/ For present purposes, the key-way end of the barge will be considered forward and the opposite end aft. The compartments will be designated as either port or starboard and numbered one through five, from bow to stern. *See* Exh. P-23.

2/ Jerry Merritt, a McDuffie employee assigned to the barge at the time of these repairs, testified that the pipe blanked off was located in the portside number three compartment, and he marked this location with an "x" next to his initials on a sketch of the barge compartment system made part of the evidence. *See* Exh. P-23.

Preparatory to executing the lease/option-to-purchase agreements whereby Ward would undertake the operation of Rig No. 15, a barge inventory was performed at Ward's request on March 12, 1974. The inventory, signed by McDuffie representatives Jerry Merritt and D. J. McDuffie (the company's president), and on Ward's behalf by Roger King and Daniel Faherty, Jr. (Ward's president in charge of operations), lists practically all equipment in "fair" or "good" condition and concludes that the overall condition of the barge was "fair," while at the same time noting that one compartment had a split seam, there was one leaky "seacock" (a valve fitted into a ship's plating used to flood tanks), and "some water" was leaking into a fuel compartment. *See* Exh. P-21.[3/] A letter of July 22, 1974 to Daniel Faherty from Harry Reineke, Jr., an independent marine suveryor, certifies that he (Reineke) physically surveyed the barge and found it equipped ***as per*** the inventory. *See id.* In testimony at trial, however, Reineke admitted that he did not conduct an actual physical survey of the vessel, which at the time was sitting on the bottom of a dry well-hole, but merely "spot checked" the rig's equipment after the inventory had been made by others (presumably the aforementioned signatories). *See* Transcript, at 136-37 [Record Doc. No. 49].

During the same month of March, 1974, Jerry Merritt became a Ward employee, and was instructed by the company to oversee certain repairs to Rig No. 15 which would be performed in Venice, Louisiana, by Superior Welding, Inc. The Superior invoices show that these repairs occurred during the period from March 14 to March 18, 1974, inclusive. *See* Exh. P-25.

[3/] **Obviously mistaken is the inventory's reference to a last dry-docking of the vessel in *1969*. *See id.* As indicated *supra*, the Hunt dry-docking occurred in 1968.**

Merritt testified that he himself tightened stem packing around a leaky seacock located in the portside number two compartment, and also supervised the cement-patching of a leak from a seam on the portside of the hull near the corner of the key-way slot. 4/

Merritt eventually reported to Faherty that the reparis were completed and Rig No. 15 ready for operation. For the next several months, it worked in different field locations south of Bayou Barataria. On April 1, 1974, McDuffie and Ward formally executed the lease and option-to-purchase contracts. *See* Exh.'s P-3 & P-4.

The rig had living quarters on deck, and assigned to it were two separate crews working alternatingly in 12-hour shifts. In each crew there was a toolpusher who supervised the rig's general operation, a driller who was responsible for actually moving and operating the barge, several crewmembers who assisted the driller and a cook. The crewmembers of Rig No. 15 who testified at trial included Dennis Melancon, first a roughneck and later a driller who left the rig prior to the day of its capsize, Jerry Merritt, a toolpusher who was assigned to the rig but was not aboard the day of the capsize, and several crewmen who were aboard when the barge turned over, toolpusher Arch Lamar Windham and drillers Michael Mahaney and Blake Short. Their testimony affords a picture of the general condition of Rig No. 15 both prior to and during the several months it was operated by Ward.

It first appears that the barge interior could not be made watertight should its deck become submerged. Both Melancon and Short testified that covers for the eight manholes on deck which led into the barge's water-holding compartments were

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4/ At trial Merritt marked both the seacock and seam locations with arrows on the sketch of the barge compartments. *See* Exh. P-23.

either missing altogether or else lacked workable latches - or "dogs" - needed to close them tightly. 5/ Mahaney likewise stated that, during his attachment to the rig from April to September of 1974, certain manhole covers were missing. 6/ Finally, Melancon recalled that many of the covers which did exist had rusted holes in them, as well as rotted linings which prevented their being sealed when shut. As for the condition of the deck plate itself, Melancon declared that, as of March, 1974, there were several holes in it both near the blow-out preventer stack in the portside key-way area and near the pump-room situated sternward. He said they appeared to have resulted from a rusting away of the metal as well as from the occasional dropping of heavy equipment on the deck. Mahaney recollected seeing during his tenure a "few holes" in one corner of the deck, in addition to others which the crew previously had patched.

5/ Melancon worked hitches on the barge from 1973 until "about March, 1974," and it is not clear whether his description of these conditions as of the latter month refers to a time before or after the mid-March repairs by Superior Welding, Inc. But Short's testimony refers to his hitches from July, 1974 until the day of the capsize in September.

6/ Mahaney marked the approximate location of the manholes by drawing oval-shaped circles on a sketch of the barge. *See* Exh. P-30A. As the drawing indicat4s, the two forward-most holes were situated relatively close to the rig's center line, while most were near the edge of the deck. Mahaney also depicted on the same sketch, with a red line, how all manholes save for the two located forward were surrounded by a seawall, which he estimates was roughly two and a half feet high.

Regarding conditions below, all crewmembers who testified agreed to the necessity of having to monitor and periodically pump out the lower compartments of Rig No. 15.[7] It generally was admitted that when the barge was being moved over longer distances than those entailed in short moves within a given field, it was customary to keep a steady watch on the water levels in the various compartments. The levels were observable visually through the maholes - those with covers were kept open for this purpose - and would be measured in height according to where the water reached the rungs on the ladders in the compartments. When the water reached a certain height, usually three feet, pumping out of the compartment commenced.

Melancon recalled that he personally had observed leaking holes in just about every compartment. He testified that when such a hole was reported to the driller, the standard remedy was to plug a wooden peg into the hole to stop the leak. He further testified that both the seacocks and the "reach-rods" attached to them for use in their opening and closing were rusted, so much so that the rods often became detached in hand and had to be welded back onto the seacock. *See* note 13, *infra* (testimony of diver Kenneth Honegger). It was his experience that, as the end result of such conditions, pumping out of compartments while the barge was under way was required as often as every thirty minutes, depending upon how fast the pumps were being run.

Michael Mahaney was somewhat more specific. He testified that, during his tenure as driller, there was steady water intake

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[7] **The barge was equipped with diesel-powered pumps as well as smaller, two-inch pumps (called "baywater pumps" by the witnesses and so designated hereafter). The larger pumps were used to suck up and jet out water from a given compartment. The baywater pumps pumped water into a pit, providing the storage water needed as a source for the suction power by which the diesel pumps would jet out.**

in Rig No. 15 both from a leaky valve in the portside number two compartment and from an unidentified source in starboard number four. The former, he said, sometimes could be sufficiently slowed by blanking off the leaking valve with a steel plate. However, the latter routinely demanded ten to fifteen minutes of pumping every hour or so simply in order to maintain an acceptably high amount of freeboard and to keep the barge moving on an even keel. 8/

According to Mahaney, both toolpushers were aware of the rig's leakage, and this appears clearly to have been the case on the basis of their own testimony. Jerry Merritt admits to having had to pump the barge out every hour or hour and a half during a move from Lafitte to Eloi Bay in the middle or end of July, 1974, although he stated that the portside number three compartment was taking water, in addition to a continuing ingress of water in portside number two through the same seacock around which he had tightened the packing in March of 1974. *See* note 4, ***supra,*** and accompanying text. Lamar Windham likewise acknowledged an awareness of leaks in the barge from the very beginning of Ward's operation, although he recalled them being in the port and starboard number three and four compartments. At trial, Windham testified that in his opinion the leaks were due to faulty valves. Yet, he also admitted the correctness of a statement given by him in connection with this litigation on October 2, 1974, to the effect that he suspected even prior to the capsize that the leaks may have been due to a holed bottom. *See* Exh. P-30, at 16-18.

8/ **Mahaney claimed to have discovered during one such pumping out that there was a free communication of water above a level of four or five feet between those port and starboard compartments divided by a common bulkhead (i.e., all those not separated by the key-way slot). He observed that, in pumping just one side, whatever water was in the corresponding side would be simultaneously lowered until the level of four or five feet. He did not ever see holes in the dividing bulkhead, but inferred it was not watertight.**

Merritt and Windham both emphasized that these leaks were not problematical but easily remediable by the barge's pumping system, and that regular pumping was simply a standard part of the barge's routine. Still, both testified to having discussed the leakage with their immediate superior, Ward Rig Manager William "Red" Royce. In fact, Windham suggests in his statement of October 2, 1974 that he mentioned the possibility of a holed bottom to Royce several weeks prior to the casualty, and, in testimony at trial, recalls making a report to Royce on the very afternoon preceding the accident that "we are jetting out about every hour and a half. . . . [b]ut nothing to worry about." *See* Transcript, at 164 [Record Doc. 37]. Royce himself, who became Rig Manager about a month and a half before the capsize, confirmed only that both toolpushers notified him of "a slight leak" in one of the compartments; but he did not regard the matter as one for concern, and specifically denies ever having been informed beforehand of the need for regular pumping, or "jetting out." *See id.*, at 218, 224-25.

In connection with negotiations for an assumption of the Rig No. 15 lease by Coastal Drilling Company, Ward engaged Harry Reinecke to conduct a "condition and evaluation survey" of the barge. As in the case of the earlier survey he had performed in March of 1974, Reinecke did not see the rig afloat, but only when it was "sitting down" on the bottom. The survey report of July 10, 1974, concludes with several recommendations, including those that the vessel be dry-docked and repaired "as necessary." *See* Exh. P-20. At trial, Reinecke testified that he intended by this proposal that the barge be dry-docked, audio-gauged to check for plate thickness of the hull and examined for wastage, so as to "put it back not necessarily as original but at least in good working order." *See* Transcript, at 121 [Record Doc. No. 49]. No such dry-docking or repair was performed by Ward.

Following an uneventful trip from the area south of Bayou Barataria to Eloi Bay in August of 1974, Rig No. 15 operated

on several drilling sites in the Bay. In early September, a hurricane passed near the Louisiana coast and blew the rig off location, causing some damage to certain machinery aboard. Red Royce testified that to the best of his recollection the equipment was repaired. Shortly thereafter, on September 27, 1974, the rig was prepared for towage by two tugs from Eloi Bay to the Harvey Canal, from there to be taken to several new job locations.

Mike Mahaney's crew was working the shift from 6:00 P.M. to 6:00 A.M. He testified that by 5:00 o'clock on the morning of September 27, the barge had been pumped out until it was sitting lightly on the bottom. The next crew relieved Mahaney's and Blake Short took over as driller. The tugs arrived between 8:00 and 9:00 A.M. and, after Short finished pumping out the barge, both made up to the stern and began towing. 9/

Short's testimony confirmed that, once *en route* on September 27, 1974, the barge still was taking water in port number two - through the leaky valve attested to, *supra*, by both Jerry Merritt and Mike Mahaney - as well as in starboard number four - from a source which Short, like Mahaney, was unable to identify. Short felt that the former intake was not serious and he did not pump out the port number two compartment during his tour, although he remembers it had about three feet of water in it when he checked it before going off duty at 6:00 P.M. He was compelled, however, to pump out the starboard number four tank for about five minutes every fifteen to thirty minutes in order to keep the barge from listing to starboard, and this pumping usually occurred whenever the compartment showed a water level of three feet.

9/ At some point in the early afternoon, the tugs turned Rig No. 15 around and resumed towing from the key-way end. According to Windham, Short and Mahaney, this was preferable on long moves. It apparently permitted a more stable tow.

In Short's view, only one "unusual" event occurred during his shift, and this was in connection with pumping operations around 11:00 A.M. or noon. He and Mahaney both testified that only one of the rig's several baywater pumps was operative on the day of the capsize; one pump had been washed over during the September hurricane and another had been malfunctioning for several weeks. 10/ When this pump ceased pulling enough storage water into the barge pit to allow the suction needed for jetting out the starboard number four compartment, Short says the barge began listing badly to starboard and, at one point, had only two inches of freeboard. 11/ He reported the difficulty to Windham, whom he recalls rather cavalierly remarking that the rig had been in worse shape before and that there was nothing to worry about. Eventually,

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10/ Short and Mahaney each recall having reported this malfunction to Lamar Windham. Short presumed a new pump engine had been ordered. Mahaney expected an electrician to be sent to work on the machine, but says no one appeared. According to Red Royce, he was notified about two weeks before the capsize that a couple of pump engines were running hot. He says a mechanic was sent out to work on them and later reported they were working properly.

11/ There was conflicting testimony as to the average amount of freeboard while the rig was under way. Jerry Merritt claimed it had an average of 4-1/2 or 5 feet of freeboard at midship while moving. But Lamar Windham testified to an average of 1-1/2 feet in the middle and 2-1/2 feet at the opposite ends (which were slightly turned up).

Short was able to repair the baywater pump and resume normal pumping operations before the list worsened. 12/

At the time the Mahaney crew came back on duty around 6:00 P.M., Short says the barge was on a relatively even keel, although Mahaney recalls a list to port or about one degree. Around 7:00, Mahaney remembers, this portside list increased to the extent it was necessary to pump out the leaking compartment number two. Then, at approximately 7:30, there developed a list to starboard, and Mahaney noticed that the water level had increased in starboard number four by about a foot in the hour and a half he had been on duty. After jetting out this compartment for about ten minutes, the supply of storage water for suction was depleted and pumping had to stop. Mahaney estimated that it would take approximately 45 minutes for the one functioning baywater pump to replenish the water supply sufficiently to pump out the starboard compartment and level the rig. He therefore suggested to Lamar Windham that the tugs be ordered to push the barge sideways,

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12/ There also was conflicting testimony from other observers of Rig No. 15 during the shift of Short's crew on September 27, 1974. H. G. Vogt, Jr., a diver, testified that he passed the barge in the Ship Channel around 11:00 A.M., while he and his son were heading in the opposite direction to a survey job. The barge, he says, was floating level at the time but several streams of water could be observed being pumped out of its starboard side. When Vogt was returning from the survey, he overtook the barge around 5:00 P.M.; and, on passing it this time, noticied a list to port which gave him the impression the vessel was holed. He testified to trying unsuccessfully to contact the tugs by radio in order to offer his services as a diver.

Yet, Wiley Falgout, captain of one of the towing tugs (the CAPTAIN WOOT), testified that he observed the rig around 5:00 P.M. and noticed no list or anything out of the ordinary. He further stated that he was tending the radio on the marine channel frequencies at all times, but was not contacted by Vogt.

According to Windham, one of the tugs - he believes it was the CAPTAIN WOOT - did call him "once or twice" within a two hour period of the start of the tow in the morning, and warned that the barge was listing slightly.

starboard side first, into the bank of the channel, and in this way stabilize the vessel until pumping could be resumed.

At approximately this time, around 7:30 P.M., Blake Short was off duty and in the galley. He recalls a starboard list developing and steadily worsening until items were sliding off the tables. It was his initial testimony at trial that he then went below and discussed the problem with Mahaney, and that they arrived at the idea of pushing the rig into the bank. However, when trial was re-commenced following a recess of about eleven months (from September 12, 1975 until October 18, 1976), Short again took the stand and announced that his original testimony had been "incomplete" in one important respect. He said he had not revealed that when he initially investigated the starboard list at about 7:30 P.M. on September 27, 1974, he discovered that Mahaney intentionally had caused the list by opening the starboard seacocks and flooding the compartments on this side. According to Short, Mahaney - who was not recalled as a witness and presumably was unavailable to testify when the trial resumed - had listed the rig in order to facilitate the cleaning of the mud pits located sternward; the accumulated mud and water apparently would flow more rapidly through drains in the bottom of the pits if the barge were leaning over. Although such pit-cleaning was a routine job, said Short, it was ***not*** customary to list the barge as part of the cleaning operation. 13/

13/ **Both Short and J. D. Ward, Ward Chairman of the Board at the time of the capsize, testified that Short made his disclosure to Ward during the recess on some indeterminate date five or six months before trial was resumed. Short explained that he had been hopeful Mahaney, a friend of his, would tell the full story; but, when Mahaney did not, he finally realized he could not in good conscience fail to do so himself.**

Yet, according to Short, Ward called him on the phone one day and then visited him at his residence that afternoon in order to inquire about a report to the effect another member of the rig's crew had left a valve open prior to the capsize. Short says he then disclosed to Ward what he

In any event, Lamar Windham readily agreed with the suggestion of Mahaney once the starboard list had developed. He therefore instructed the tugs to push the starboard side of the barge against the shallower bank. He claims he did not specify the right-hand bank as the shallower; but he felt the tugs were correct in considering it such as they began pushing toward it, because the trees along the bank indicated shallower water to him. Meanwhile, as this maneuver commenced, Mahaney says he opened the portside seacocks (i.e., in the port number two and four compartments) in order to counteract the starboard list by flooding and lowering the left side of the barge. Windham recalls that he agreed to this tactic when Mahaney proposed it. The latter claims that he closed these valves as soon as the barge started to level off, but, in his post-recess testimony, Blake Short stated that the barge capsized before Mahaney could get back to shut the portside seacocks.[14/]

[13/] Continued

he knew about the intentional listing. Ward, on the other hand, testified that he was seeking Short for the purpose of his giving a deposition in a separate lawsuit growing out of the accident, and that, after unsuccessfully trying to reach Short personally, he telephoned his wife and arranged through her to visit Short at home that eveining. Ward recalls that Short made the disclosure in the course of a general conversation about the incident.

[14/] The testimony of two divers who inspected the seacocks of Rig No. 15 in its capsized position fails to satisfactorily resolve the conflict. Kenneth Honegger, who performed an inspection dive for Ward in November of 1974, and O. Kiel ("O.K.") Moore, who dived during the Ward salvage operation in early 1975, testified to finding the port number two valve partially open and open (respectively). But Honegger could not locate the portside number four seacock, and Moore, who did locate it, said it was closed.

On the opposite side, Honegger found the valve in starboard compartment number two open, and, when he tried to close it using the reach rod, the latter came off in his hand. Moore also said the starboard number two valve was open (partially) when he saw it.

As the tugs continued to push Rig No. 15 toward shore, Mahaney had enough storage water to resume jetting out of the starboard side. Both he and Short recall that the barge was just about level as it was being pushed up against the bank. Mahaney says he then realigned the pumps and began jetting out the port number four compartment, where he approximates three feet of water had accumulated while the seacock was open. By the estimation of both Mahaney and Windham, there next occurred a period of equilibrium which lasted about five minutes. It was followed by a very sudden list to port, which steadily became more extreme. The pumps operated at full speed and began overheating, unable to counter the increasing list. Finally, as the boats sounded danger signals and pulled away, Rig No. 15 rolled over to port and capsized in the calm waters of the Gulf Outlet. One crewmember drowned, and others of the barge's crew were rescued by the tugs.

The next morning, Daniel Faherty, Jr., and Jerry Merritt inspected the barge in its upside-down position. It was mostly submerged, but one corner - the stern starboard corner - was protruding above the water. Merritt recalls noticing at this time that this visible section of the hull was holed.

On September 29 and 30, 1974, Wallace Shiver, a marine surveyor for Maritime Surveyors, Inc., was engaged by certain underwriters of the barge to survey the capsized rig, and a series of photographs he took on those days were admitted into evidence. *See* Exh. D-7. Several of these show a hole measuring roughly 3-1/2 by 1-1/2 inches in the bottom of the vessel, 15/ which Merritt recognized as the same hole he had observed the morning after the accident. *See* Exh. D-7(A) through (E).

15/ An expert metallurgist later called upon to examine the hole, Stephen Teleshak, traced its shape and size on a piece of paper. *See* Exh. Teleshak No. 1.

Shiver measured a distance of about seven feet between the hole and the aft bulkhead of Rig No. 15 (i.e., that dividing the fuel tank from the mud pump tank), and measured inboard a distance of about fifteen feet between the starboard edge of the barge and the hole. Given the dimensions of the rig, the arrangement and size of the compartments (*see* Exh. P-23) and the fact that the holed section was the stern starboard corner of the hull, it thus becomes clear that the hole was located in the bottom of starboard compartment number four. 16/

Also engaged by Maritime Surveyors, Inc., to inspect the capsized barge on September 30, 1975 was diver H. G. Vogt, Jr., the same individual who had passed the rig twice on the day of its fateful journey. *See* note 12, *supra.* Viewing the exposed bottom as well as what was beneath the water, Vogt recollects that there was wasted plate in the vicinity of the hole, and, more specifically, pit-mark indications of thin plating within an area of five or six feet therefrom. In his view, wastage, as opposed to a sudden puncture, created the hole.

Two experts who inspected the barge around the same time, Shiver and metallurgist Stephen Teleshak, agreed. The former observed that the plating in the holed area seemed to be "very thin" and that the edges of the hole were sharp and turned inward, indicating to him that the plate had just wasted away and finally was pushed in either from water pressure or from being struck with something. Teleshak, who was called upon by Maritime Surveyors to visit the rig on October 3, 1974, remembered that the edges of the hole were flat instead of turned in - a recollection made somewhat questionable by

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16/ **In fact, reconstructing its location on the basis of the earlier visual sightings of the hole, one of the expert marine surveyors who testified, Ryan Uhlich, so depicted its situation in a sketch prepared after the salvage operation. *See* Exh. D-17.**

the photographs themselves, exhibits D-7(A) through (E) - but nonetheless concurred that the plating in the area of the hole was wasted away to a paper-like thinness. In his opinion, set forth in a report of July 28, 1975, the depression formed by a girder in the area of the hole caused the retention there of water inside the hull and led to gradual corrosion from the interior outward. *See* Exh. D-1.

Following the failure in December, 1974, of Ward's initial arrangement for the salvaging of the rig by Statler Marine Service, Inc., the company decided in the early part of 1975 to have the salvage performed under Jerry Ward, a son of J. D. Ward who had studied engineering and also worked as a roughneck on some of Ward's rigs. As noted, ***supra***, the diver hired in connection with the operation was O.K. Moore, who recalls that the salvage work covered a period between March and May of 1975. Moore testified that when he and a fellow-diver (who was not called as a witness) inspected the overturned deck of Rig No. 15 prior to pumping the barge with air to raise it, they discovered and patched no less than five leaks, some of which were holes while others were cracked welds. 17/ An explosive charge then was set off to cut loose the derrick, which explosion - according to Moore - blew the patch off of one leak and widened another, but which - according to Jerry Ward - also created some new openings. After further patching and sealing such leaks, the compartments of the barge were pumped full of air and its stern-half lifted to the surface. Cables were wrapped around the hull and hitched to a derrick, which rolled Rig No. 15 back to an upright position. *See* Exh. P-29(a) through (1).

The resurrected barge was towed to a yard in the Harvey Canal. There it lay moored, stripped of all equipment, as its condition was observed in the late summer of 1975 by several

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17/ **Moore marked the locations of the leaks by green numbers one through five on a sketch of Rig No. 15 which was assumed to depict an upside-down view of the vessel. *See* Exh. P-23A.**

experts who were called to testify for the defendants. Ryan Uhlich, a marine surveyor and President of Maritime Surveyors, Inc., visited the location on July 26, 1975 along with another surveyor engaged by him, Kenneth Trueman. The latter identified and individually described a series of 32 photographs taken by Uhlich on that day. *See* Exh. D-8, Nos. 1-32. Some of these show general pitting and wastage in various areas of the deck plating. *See id.*, Nos. 3, 5-9, 13-15, 19, 21, 22 and 24. Others represent a fracture in one of the corners of the key-way slot. *See id.* Nos. 10 and 11. Still others depict a pitted manhole cover, a cover without latches and a manhole without a cover. *See id.*, Nos. 4, 12 and 25. Uhlich, who also visited the rig in this location on July 29 and August 9, 1975, identified another set of 19 photographs which he took of the rig's interior. *See* Exh. D-9, Nos. 1-19. Among these are pictures of corrosion and holes which he says he observed in the pipeline of the starboard number three compartment connecting the latter with its portside counterpart. *See id.*, Nos. 7-14. A group of six photographs were identified as having been taken on Uhlich's August 9 inspection. *See* Exh. D-10, Nos. 1-6. Several of these illustrate holes and rust in the connecting pipeline located in the port number three compartment as well. *See id.*, Nos. 3, 4 and 6.

On the basis of these inspections, Uhlich concluded that the deck of the barge was in an "advanced state of deterioration," and that, as Michael Mahaney had observed during the vessel's operation (*see* note 8, *supra*), there was free communication between the number three compartments due to the corroded condition of the inter-connecting pipe. These interior findings were graphically summarized on a sketch of the barge compartments. *See* Exh. D-17. [18] Uhlich further opined that these

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[18] The sketch represents a "wood plug ia [a] hole" found in the starboard number three compartment's pipeline. *See id.* One of the photographs was described by Uhlich as showing the same plugged hole. See Exh. D-9, No. 6. Corroborated at least to some extent, therefore, is the testimony of Dennis Melancon that drillers ordered holes discovered in the barge's interior simply plugged up with wooden pegs. *See* pp. 9-10, *supra.*

conditions, as he observed them in 1975, pre-existed the 1974 casualty, and in fact appeared to have existed over a period of many - perhaps ten to twenty - years.

Arthur Sargent, an expert in naval architecture and marine engineering, saw Rig No. 15 in the Harvey Canal on July 30, 1975. As noted in a letter report of that day made to counsel for the defendants, the deck was found to be "heavily wasted and thin" in most places and "perforated through corrosion," manhole covers were found wasted and securing cover latches missing and the deck at the corners of the key-way slot was observed to be fractured. *See* Exh. D-3. Sargent recommended that the vessel's plating be audio-gauged to determine its thickness and condition, before concluding his report with the remarkably understated opinion that the hull in its then-existing condition was "not suitable" for operations as a workover barge. *See id.*

Pursuant to Sargent's suggestion, marine surveyor Leonard Brechtel visually inspected Rig No. 15 on August 9, 1975, and then audio-gauged its accessible plating on August 12. Among the results of the first visit - as he noted in a subsequent report - were his findings that the vessel's deck was "heavily wasted, holed and fractured in numerous locations," and that the pipe located in and connecting the port and starboard compartments number three also was "heavily wasted and holed. . . ." *See* Exh. D-13. Several photographs taken by Brechtel at the time illustrate the wasted holes on the deck level as well as those he found in the compartmental pipeline. *See* Exh. D-13, photo Nos. 1-5. 19/ With regard to the audio-gauging, a vessel diagram

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19/ An additional photograph purports to show a corroded sea chest valve in one of the compartments (Brechtel believes it was starboard number two), from which the reach rod had become detached. *See ied.*, No. 6. This is the same rod which diver Kenneth Honegger says came off in his hand in November of 1974. *See* note 14, *supra.*

represents the various measurements of metal thickness made in areas on deck as well as along the sides of the hull. *See* Exh. D-13(a). All such measurements are indicated as being less - in most cases, considerably less - than the thickness of .375" which Brechtel testified is customary for a vessel such as Rig No. 15.

When asked at trial about the duration of the conditions they observed, both Sargent and Brechtel, like Ryan Uhlich, ruled out the possiblility that these were recent phonomena. Brechtel felt that the deficiencies which he noted in August of 1975 had not grown up within a period of only one year. Sargent concluded that the deterioration he observed was the cumulative effect of "many years' service" of the vessel.

Concerning the actual cause of the capsize, the opinions offered by various witnesses are not so easily reconciled. Testifying on the plaintiffs' behalf, Harry Reinecke averred that a combination of improper actions taken by the rig's and tugs' crews led to the sinking. He explained that, in the circumstances of this case, opening valves in order to list a barge for cleaning purposes - as Mahaney is alleged to have done - would demonstrate a lack of good seamanship for the simple reason that the freeboard of a barge under way and already listing to one side should be increased, and not reduced by the further intake of water. Likewise improper, according to a letter report by Reinecke to plaintiffs' counsel, was Mahaney's opening of the portside valves to counteract the starboard list as the rig was being pushed toward the bank of the channel. *See* Exh. P-22. In Reinecke's view, this not only increased immersion of the barge by adding to its overall intake of water, but also, in conjunction with the ongoing pumping out and eventual grounding of the starboard side, inevitably produced a serious list

to port.20/ As a final incident of judgmental error, Reinecke cited the decision to shove the barge sideways into the right-hand bank. He claims it should have been pushed bow-first into the shore, since this would have provided leverage against the rig rolling over and afforded it greater stability when grounded-particularly in light of the water depth and cut of the bank.21/

An expert marine engineer called by the defendants, Arthur Sargent, agreed that the forces created by pushing Rig No. 15 into this particular bank contributed to the port side list and

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20/ Mike Mahaney had a different notion as to what caused the sudden portside list. He opined that continued pushing by the tugs of the starbard side into the mud bank created a suction effect on the hull itself, and that the suction finally broke off with sufficient impetus to force an irreversible roll in the port direction.

21/ According to a sketch of depth soundings made by Jerry Ward at the time of salvage, the bank sloped out gradually but then, at a depth of ten feet, dropped off rather precipitously to twenty feet in the area where, 450 feet from shore, the barge capsized. *See* Exh. p-23. It is safe to assume that the rig, which was eleven feet deep, had less than a foot of freeboard by the time it reached shore, given the extreme starboard list and the intake of water through open valves on the port side. When grounded then, the barge apparently was up against the bank at the ten-foot depth where the sharp drop-off occurred; and, as suggested by a diagram based upon one drawn by Reinecke and made part of the evidence, the continued pushing by the tugs and intake of water on the port side could hardly assure stable beaching under these circumstances. *See* Exh. Reinecke -1.

Lamar Windham effectively endorsed this view. He testified that, if he knew then what he now knows about the steep cut of the bank, he would undertake the beaching maneuver of September, 1974, by pushing either the bow or stern of the rig onto shore.

capsize, and submitted an illustrative sketch reminiscent of that drawn by Reinecke. *compare* Exh. Sargent-2 *with* Exh. Reinecke-1. However, Sargent emphasized that any ignorance or incompetence on the part of the crew should be viewed in the prospective of the barge's overall condition of instability and disrepair as of the date of capsize. He noted that Rig No. 15 had not been dry-docked in well over the two years described by him the normal interval for dry-docking such barges, despite the recommendation of Reinecke himself only a few months before the accident that a dry-docking occur and notwithstanding ongoing leakage and the needfor unusually frequent and sustained pumping out. Asked to define the cause of the catastrophe, Sargent concluded that it was

> [t]he lack of proper care on the part of the owners for not taking the necessary precautions . . . for example, dry-docking the vessel, making proper inspection, examining the valves, looking at the bottom, taking care of the holes, making certain that the covers on the deck plates were in proper efficient operation.
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> In short [he added], the vessel was in the worst condition of just about any operating vessel that I have ever seen.

See Transcript, at pp. 356-57 [Record Doc. No. 49].

Such opinion evidence clearly is germaine to a determination whether the loss of Rig No. 15 was due to a cause covered under the hull policy. However, one of the arguments made on behalf of the underwriters is that the plaintiffs breached their implied warranty of unseaworthiness at the outset of the policy period, precluding coverage *ab initio* and making it unnecessary to resolve the question of causation. We find merit in this defense.

The Fifth Circuit has held that in time policies of marine

insurance there exists such an implied warranty of seaworthiness running in favor of the insurer. *See Gulfstream Cargo, Ltd. v. Reliance Insurance Co.*, 409 F.2d 974 (5th Cir. 1969); *Tropical Marine Prod. v. Birmingham Fire Ins. Co. of Pa.*, 247 F.2d 116 (5 Cir.), *cert. denied*, 355 U.S. 903, 78 S.Ct. 331, 2 L.Ed. 2d 260 (1957); *Saskatchewan Government Insurance Office v. Spot Pack*, 242 F.2d 385 (5 Cir. 1957). In an earlier opinion, we recognized the existence and effect of such an obligation:

> It is impliedly warranted that the vessel is seaworthy as of the very moment of the attachment of the insurance; and if the vessel is in fact unseaworthy at the time the insurance were to attach, the breach avoids the policy.

See Lemar Towing Co., Inc. v. Fireman's Fund Insurance Co., 352 F. Supp. 652, 660 (E.D. La. 1972), *aff'd* 471 F.2 609 (5 Cir.), *cert denied*, 414 U.S. 976, 34 S.Ct. 292, 38 L.Ed. 2d 219 (1973).

For present purposes, it is important to distinguish this implied guarantee from the continuing warranty of seaworthiness which arises once the policy comes into existence, and under which it is warranted that the insured owner will not knowingly or in bad faith allow the vessel to go to sea in an unseaworthy condition. The former is premised upon the general insurance principle of ***uherrim fides***, i.e., complete candor in disclosing all facts materially affecting the risk involved. *See Texaco, Inc. v. Universal Marine, Inc.*, 400 F. Supp. 311, 322 (B.C. La. 1975). Hence, unlike the continuing warranty of seaworthiness - breach of which must proximately cause the loss in order for the underwriter to be exonerated - a breach of the implied warrenty which attaches at the very commencement of the risk avoids coverage and renders the policy ineffective even if the actual loss stems from a separate and totally unconnected source. *See Gulfstream Cargo, Ltd.*

v. Reliance Insurance Co., supra, at 983 nn. 26 & 28 (5 Cir. 1969); *Lemar Towing, Inc. v. Fireman's Fund Insurance Co.*, 352 F. Supp. at 660.

Rig No. 15 had not been dry-docked and its hull inspected for a full six years prior to the capsized. Yet, during the same period, it was in regular use and exposed to the normal wear and tear attendant upon an inland workover barge's operation. The evidence clearly preponderates, and it is hardly to be unexpected as a practical matter, that over this course of time the vessel deteriorated both internally and externally. Eventually, it lacked the necessary deck plating and manhole system above, as well as properly operating seacocks, compartmental separation and sound bottom plating, to give it watertight integrity while under way. On any move other than short ones within the same field, recurrent listing to either port or starboard and periodic, corrective pumping out became standard features of the rig's routine. Finally, that such general dilapidation existed as of the commencement of the hull policy's term on August 15, 1974, appears established not only by the credible testimony of the experts who inspected the barge in its capsized and salvaged state, but also from the opinion of plaintiffs' own expert witness, Harry Reinecke, who, only one month before the policy was to take effect, recommended to Ward that Rig No.15 be dry-docked for repairs. He explained at trial that he felt this action advisable in order to "put [the barge] back . . . in good working order."

Judge Lumbard of the Second Circuit Court of Appeals quite appropriately noted that

> [a] vessel which requires constant pumping at virtually the capacity of her pumps in order to keep afloat is not seaworthy. Were it otherwise, seldom would a vessel be unseaworthy as it could always be said that her defects were curable by emergency measures.

See McAllister Lighterage Line, Inc. v. Insurance Company of North America, 244 F.2d 867, 870 (2 Cir. 1975).

"Seaworthiness," of course, is not a rigid concept, depending for its definition upon the nature and purpose of the particular vessel. Still, it generally comtemplates a ship

> sufficiently strong and staunch and equipped with the the appropriate appurtenances to allow it to safely engage in the trade for which it was intended.

See Texaco, Inc. v. Universal Marine, Inc., supra, at 320. Even giving such words their most liberal import, we think it clear by a preponderance of the evidence that Rig No. 15 was not reasonably well-suited for its intended use as an inland drilling barge as of August 15, 1974. 22/ This constituted a breach of the implied warranty of seaworthiness which extended to the underwriters at the commencement of the risk. Accordingly, coverage of the vessel's loss under the policy is avoided.

Although not compelled to go further, we might add that the same conclusion as to the absence of coverage appears supportable *via* an alternative analysis. Assuming effective coverage

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22/ In reaching this conclusion we may again invoke the testimony of the plaintiffs' expert, Reinecke. The following exchange occurred during cross-examination of the latter by defendants' counsel:

Q. "Do you have any comment to make about a barge which could be kept afloat only by pumping every hour or so?"

A. "Yes, sir, it should be dry-docked and repaired."

Q. "And the watertight integrity, during moves in deep water, is vital not only to the safety of the vessel but the safety of the people aboard it, isn't that true?"

A. "Of course, yes, sir."

See Transcript, at p. 150 [Record Doc. No. 49].

of Rig No. 15 as of the commencement of the hull policy, it of course becomes the plaintiffs' burden to prove that the subsequent loss of the rig was a peril insured against. *See S. Felicione & Sons Fish Co. v. Citizens Causalty Co. of N.Y.*, 430 F.2d 136, 138 (5 Cir. 1970), *cert. denied*, 401 U.S. 939, 91 S. Ct. 936, 28 L. Ed. 2d 219 (1971). More particularly, it is the obligation of these plaintiffs to show that the capsize resulted either from a "peril of the sea," from a "latent defect" in the barge's hull or machinery, or from the negligence of the drilling crew.

As used in marine insurance policies, the phrase "perils of the sea" refers to risks associated with the sea, including such features of the sea as may cause damage to a vessel. *See in re Gulf & Midlands Barge Line, Inc.*, 509 F.2d 713, 719 (5 Cir. 1975).

It is understood to encompass

> those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence.

See Reisman v. New Hampshire Fire Insurance Co., 312 F.2d 17, 19 (5 Cir. 1963). The evidence in this case convinces us that Rig No. 15 was in a condition of serious deterioration on September 27, 1974, and that its sinking resulted from this circumstance rather than from some extraordinary and perilous force of the sea. 23/

23/ Reinecke testified that in his opinion the hole in the bottom of starboard compartment number four had been made just prior to the move of the rig from Eloi Bay. Even crediting this theory, however, we are persuaded by the evidence concerning the wastage in the area of the hole that longstanding deterioration finally allowed the bottom of the rig to be holed.

Neither have the plaintiffs carried their burden of proving to our satisfaction that the condition of the barge which led to its capsize was a "latent defect" in the hull. Such a defect must be one not discoverable by a reasonably careful inspection, *see Reisman v. New Hampshire Fire Insurance Co.*, supra, at 20, and is not the result of gradual deterioration and expected wear and tear. *See Waterman S.S. Corp. v. U.S. S. R. & M. Co.*, 155 F.2d 687 (5 Cir. 1946) and cases cited at p. 691, nn. 9, 10 & 11. A prior dry-docking and routine inspection of the hull would have alerted the owner and/or operator of Rig No. 15, if not to the hole itself, then at least to the condition which was conducive to holing.

Finally, as to the negligence of the crew, it is important to note the limitation in this section of the Inchmarce Clause to the effect that the loss must not have resulted from "want of due diligence" on the part of the vessel owner. Based on the foregoing, it should be patent that McDuffie, as well as Ward, failed to exercise ordinary and reasonable care in attending to the inspection and repair of the rig, and that this carelessness, as much as any subsequent negligence in operating the barge, resulted in its loss. 24/

24/ An illustration is provided by the lack of sufficient pumping equipment aboard the rig on the day it sank. The problem arose earlier in the month of September, 1974, when a hurricane apparently reduced the number of functional baywater pumps to one, and the matter was reported to Red Royce. Yet, a leaking and listing barge in need of frequent jetting out made the move from Eloi Bay with but one machine available to provide the storage water necessary for the pumping operation. Notably, it was the inadequacy of this equipment situation which not only caused a near-crisis during Blake Short's tour, but which also precipitated the fatal attempt to ground the rig.

Having rejected the plaintiffs. main demand for recovery of the face amount of the policy, we may briefly dispose of their additional claims for "sue and labor" expenses, penalty and attorney's fees and pre-judgment interest. The inappropriateness of fees and interest is self-evident. As to the recovery of expenses incurred by the plaintiffs pursuant to the policy's "Sue and labor" clause, it is likewise clear that the rationale and applicability of this provision are obviated in the absence of coverage. *See Continental Food Products, Inc. v. In Co., Etc.*, 544 F.2d 834, 837 (5 Cir. 1977).

Judgment therefore will be entered in favor of the defendants, dismissing the plaintiffs' action against them with costs.

UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana

August 3, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

D. J. McDuffie, Inc.
Versus
Old Reliable Fire Insurance Company,
Reserve Insurance Company,
Yosemite Insurance Company

Filed August 5, 1977

JUDGMENT

Considering the Court's Memorandum Opinion and Order filed herein dated August 3, 1977,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Old Reliable Fire Insurance Company, Reserve Insurance Company, and Yosemite Insurance Company, and against plaintiffs, D. J. McDuffie, Inc. and Ward Drilling Company, Inc., dismissing plaintiffs' action at plaintiffs' costs.

New Orleans, Louisiana, this 5th day of August, 1977.

NELSON B. JONES, CLERK /S/

NELSON B. JONES, CLERK

APPROVED AS TO FORM:

ILLEGABLE

UNITED STATES DISTRICT JUDGE

TWENTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE FO LOUISIANA
DIVISION
D.J. McDUFFIE, INC.
versus
OLD RELIABLE FIRE INSURANCE COMPANY,
RESERVE INSURANCE COMPANY AND
YOSEMITE INSURANCE COMPANY

Filed December 4, 1974
A. Guccione /S/
Deputy Clerk

PETITION

The petition of D.J. McDuffie, Inc., a Louisiana corporation, which has its registered office in the City of Plaquemine, Louisiana, respectfully represents:

1

The defendants, Old Reliable Fire Insurance Company, Reserve Insurance Company and Yosemite Insurance Company are foreign corporations licensed to do business in this State, and are indebted jointly, severally and in solido unto the plaintiff in the amount of FOUR HUNDRED SEVENTY FIVE THOUSAND AND 00/100 ($475,000.00) DOLLARS, together with penalties and attorney's fees, legal interest and all costs of these proceedings, for the following, to wit:

2

On September 27, 1974, the above named insurance companies were the hull insurance underwriters for the movable drilling barge known as the Ward Barge and Rig No. 15" and also known as the "Delsey D". A copy of the policy is attached and made a part of this pleading.

3

At the aforementioned time, D.J. McDuffie, Inc. was the owner and additional insured under the hull insurance policy issued by the defendants.

On the aforementioned date and at approximately 8:00 p.m., the "Delsey D" capsized in the Gulf Outlet Seaway which is within the confines of this Parish.

5

Despite repeated requests by plaintiff for hull insurance coverage, defendants have denied coverage on the grounds that the capsizing does not fall within paragraph 2 of the additional perils clause of the policy in question.

6

Representatives of defendants conducted a partial investigation by interviewing some of the crew members and conducting a metallurgical survey. To date, plaintiff has not received the results of this survey, even though requested on numerous occasions; additionally, a review of those statements taken of crew members clearly show that the sole and proximate cause of the capsizing of the "Delsey D" was caused by crew negligence, which is a peril covered by the policy of insurance.

7

Defendants' denial of coverage is without foundation, and amounts to an arbitrary and capricious aciton on their part subjecting them to penalties and attorneys fees under LSA-R.S. 22:658.

8

As a result of the capsizing, the "Delsey D" has been rendered a constructive total loss, and therefore, plaintiff has sustained a loss as his interest appear in the amount of $275,000.00; additionally, the policy of insurance provides a 25% of the face value of the policy for the raising of the

drilling barge or an additional amount of $68,750.00.

9

Plaintiff is continuing to suffer losses for down time, rental and deterioration in the amount of $200,000.00.

WHEREFORE, plaintiff prays for judgment against the defendants in the full sum of FOUR HUNDRED SEVENTY FIVE THOUSAND AND 00/100 ($475.000.00) DOLLARS, along with penalties, attorneys' fees and legal interest.

Michael E. Wanek /S/

HAMMETT, LEAKE, HAMMETT,
HAYNE & HULSE
4600 One Shell Square
New Orleans, 70139
Tel. 581-2121

PLEASE SERVE:
Old Reliable Fire Insurance Co.
Through the Secretary of State
Baton Rouge, La.

Reserve Insurance Company
through the Secretary of State
Baton Rouge, La.

Yosemite Insurance Company
through the Secretary of State
Baton Rouge, La.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

D.J. McDUFFIE, INC.
versus
Old Reliable Fire Insurance Company,
Reserve Insurance Company, and
Yosemite Insurance Company

PETITION OF DEFENDANTS FOR REMOVAL

The petition of Old Reliable Fire Insurance Company, Reserve Insurance Company, and Yosemite Insurance Company respectfully represents:

I

D.J. McDuffie, Inc., a Louisiana coporation, has filed a suit in the 24th Judicial District Court, Parish of Jefferson, State of Louisiana, against the petitioners, seeking to recover $475,000.00 together with alleged penalties and attorney's fees, interest and costs.

II

Petitioner Old Reliable Fire Insurance Comapny is a corporation organized and existing under the laws of the State of Missouri, petitioner Reserve Insurance Company is a corporation organized and existing under the laws of the State of Illinois, and petitioner Yosemite Insurance Company is a corporation organized and existing under the laws of the State of California.

III

The action aforesaid is a civil action where the amount in controversy, as to each defendant, exceeds the sum or value of $10,000.00 exclusive of interest and costs, and is between citizens of different states, so that this honorable Court has jurisdiction thereof pursuant to Title 28, United States Code, Section 1332.

IV

Defendants are entitled to remove the action aforesaid from the 24th Judicial District Court, Parish of Jefferson, State of Louisiana, to this Honorable Court, the United States District Court for the Eastern District of Louisiana.

V

The pleadings in the action aforesaid were served on defendants through the Secretary of State of Louisiana on December 6, 1974.

VI

Petitioners attach hereto copies of all process, pleadings and orders served on them in the action aforesaid.

VII

Petitioners herewith file and accompany this petition with bond as specified by United States Code Title 28, Section 1446(d).

WHEREFORE, your petitioners pray that this action be removed from the 24th Judicial District Court, Parish of Jefferson, State of Louisiana, to this Honorable Court, the United States District Court for the Eastern District of Louisiana. December 20, 1974.

Benjamin W. Yancey/S/

Benjamin W. Yancey

Rufus C. Harris, Jr. /S/

Rufus C. Harris, Jr.

Rufus C. Harris, III /S/

Rufus C. Harris, III

TERRIBERRY, CARROLL, YANCEY & FARRELL
2141 International Trade Mart
New Orleans, La. 70130
Telephone: 523-6451
Attorneys for Petitioners

VERIFICATION

STATE OF LOUISIANA
PARISH OF ORLEANS

Benjamin W. Yancey, of lawful age, being duly sworn, deposed and said that he is one of the attorneys for petitioners herein, that he has prepared and read the foregoing petition for removal, and the matters and things contained therein are true and correct to the best of knowledge, information and belief.

Benjamin W. Yancey/S/
Benjamin W. Yancey

Sworn to and Subscribed
before me this 20th day
of December, 1974.

Edward Merrit
Notary Public

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
CIVIL ACTION NO. 74-3416
SECTION "D"

D.J. McDUFFIE, INC.
VERSUS
OLD RELIABLE FIRE INSURANCE COMPANY,
RESERVE INSURANCE COMPANY, AND
YOSEMITE INSURANCE COMPANY

MOTION TO AMEND PETITION FOR REMOVAL

NOW INTO COURT, through undersigned counsel comes Old Reliable Fire Insurance Company, Reserve Insurance Company, and Yosemite Insurance Company who respectfully move that they be allowed to amend their peition for removal in the following manner:

1. By amending paragraphs I, II, III, as follows:

I

"D.H. McDuffie, Inc., a Louisiana corporation now and at the time this action was brought, with its principal place of business in Louisiana, has filed a suit in the 24th Judicial District Court, Parish of Jefferson, State of Louisiana, against the petitioners, seeking to recover $475,000 together with alleged penalties and attorneys' fees, interest and cost.

II

"Petitioner Old Reliable Fire Insurance Company when the aforesaid action was commenced, was and now is a corporation organized and existing under the laws of the state of Missouri, with its principal place of business at 231 West Lockwood Avenue, Webster Groves, Missouri; petitioner Reserve Insurance Company when the aforesaid action was commenced, was and now is a corporation organized and existing under the laws of the state of Illinois, with its principal place of business at 65

East South Street, Chicago, Illinois; and petitioner Yosemite Insurance Company when the aforesaid action was commenced, was and now is a corporation organized and existing under the laws of the state of California, with its principal place of business at 717 Market Street, San Francisco, California.

III

The action aforesaid is a civil action where the amount in controversy, as to each defendant, exceeds the sum or value of $10,000 exclusive of interests and costs, and is between citizens of different states, now and at the time when this action was brought, so that this Honorable Court has jurisdiction thereof pursuant to Title 28, United States Code, Section 1332.

2. All the other allegations of the petition, and the prayer thereof remain, and shall be taken to remain, as set forth in the original petition.

TERRIBERRY, CARROLL, YANCEY
& FARRELL

Benjamin W. Yancey /S/
Benjamin W. Yancey

Rufus C. Harris, Jr./S/
Rufus C. Harris, Jr.

Rufus C. Harris, III /S/
Rufus C. Harris, III
2141 International Trade Mart
New Orleans, La. 70130
Telephone: 523-6451

ORDER

IT IS ORDERED that leave to amend petition for removal is granted, and that the said petition be, and it hereby is, amended in conformity with the foregoing.

Edward Boyle, /S/
JUDGE

April 23, 1975

CERTIFICATE

I hereby certify that a copy of the foregoing has been served upon opposing counsel in person this 23 day of April 1975.

Benjamin W. Yancey /S/